(2)

No. 10-944

[illegible] MAR 25 2011

In the Supreme Court of the United States

CHARLES E. HOLSTER III, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioner,

v.

GATCO, INC., DOING BUSINESS AS FOLIO ASSOCIATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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March 25, 2011

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QUESTION PRESENTED

1. Whether this Court should review the Second Circuit's application of long-settled principles of statutory construction when it construed, and then enforced as written, the unambiguous "private right of actions" provisions of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(3).

RULE 29.6 STATEMENT

Gatco, Inc., dba Folio Associates, does not have a parent company and there are no publicly held companies that own more than ten percent (10%) of Respondent's stock.

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Under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, a private party "may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State" a claim for an alleged violation of the TCPA. 47 U.S.C. § 227(b)(3) ("section 227(b)(3)").

The TCPA's unambiguous language therefore limits private rights of action to those cases where the laws of the state in which the action is filed permit the filing of such claims.

Here, Petitioner commenced his putative TCPA class action in a federal district court in New York; specifically, the United States District Court for the Eastern District of New York. His action sought an award of statutory penalties against Respondent pursuant to section 227(b)(3).

Section 901(b) of the New York Civil Practice Law and Rules ("CPLR"), however, does not allow actions seeking to recover statutory penalties to be maintained as class actions.

Petitioner fails to recognize the basic statutory construction of the TCPA's private right of action – section 227(b)(3). The TCPA's language is clear: a private right of action under the TCPA may only be brought if the claimant is "otherwise permitted" to do so "by the laws or rules of court of a State" in which the action has been brought.

Petitioner brought his putative TCPA class action in a court located in New York. New York law – specifically, CPLR 901(b) – prohibits class actions under the TCPA. His action is barred by the plain,

unambiguous language of the TCPA. The district court and United States Court of Appeals for the Second Circuit so held, and their decisions were justified by well-settled principles of statutory construction.

STATEMENT

I. Statutory Background

A. TCPA

The TCPA was enacted to "to deal with an increasingly common nuisance – telemarketing." *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 514 (3d Cir. 1998). The TCPA was intended to give states the authority to regulate interstate telemarketing practices because of the ability of telemarketers to avoid state law restrictions by only placing interstate calls. *See* S. Rep. No. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968.

To diminish and/or eliminate unwanted interstate telemarketing, Congress enacted a private right of action for TCPA violations. The TCPA provides that a private party "may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State. . . an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater. . ." 47 U.S.C. § 227(b)(3)(B). If a court finds that a defendant "willfully or knowingly" violated the TCPA, it may increase the award to not more than treble the damage award. *Id.*

B. Class Action Fairness Act of 2005 ("CAFA")

In 2005, CAFA amended 28 U.S.C. §1332, to, among other things, permit aggregation of damages claimed by members of a putative class to meet a new $5,000,000 threshold for diversity jurisdiction. *See* 28 U.S.C. § 1332(d). In enacting CAFA, Congress recognized that "[o]ne of the primary historical reasons for diversity jurisdiction 'is the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court.'" S. Rep. No. 109-14, Section III (Purposes), at 5 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 6 (citation omitted). CAFA was intended to thwart abuses of class action lawsuits and forum shopping.

C. CPLR 901(b)

CPLR 901(b) provides that "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." CPLR 901(b) (McKinney's 2005). It is settled that CPLR 901(b) prohibits TCPA class actions under New York law. *See Bonime v. Bridge 21, Inc.*, 21 A.D.3d 393, 393 (2d Dep't 2005); *Leyse v. Flagship Capital Servs. Corp.*, 22 A.D.3d 426, 426 (1st Dep't 2005); *Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc.*, 22 A.D.3d 148, 149 (2d Dep't 2005).

II. Petitioner's Lawsuit

Petitioner filed his Amended Class Action Complaint against Respondent in the United States District Court for the Eastern District of New York on July 11, 2005. His individual claim asserts a single violation of the TCPA and seeks statutory damages of $500 plus additional statutory damages of $1,000 in the event the court were to find that the alleged violation was willful. Pet. App. 20a-21a. Petitioner grounded his claim to federal subject matter jurisdiction on CAFA. Pet. 1. In an effort to meet the amount in controversy requirement for diversity jurisdiction, he framed his complaint as a putative class action on behalf of all persons and entities to which Respondent allegedly sent unsolicited facsimile advertisements in violation of the TCPA.

III. District Court's Decision

Respondent moved to dismiss Petitioner's Amended Class Action Complaint for lack of subject matter jurisdiction. The district court granted Respondent's Motion to Dismiss based on CPLR 901(b)'s prohibition of TCPA class actions. Pet. App. 33a-34a. The district court reasoned that state substantive law applies to putative TCPA class actions brought in federal court, which required the district court to apply CPLR 901(b) to Petitioner's claim. *Id.* at 32a. Because CPLR 901(b) prohibits TCPA class actions brought in New York, the district court held that it applied in this case, and dismissed Petitioner's claim. *Id.* at 33a.

IV. Second Circuit's October 31, 2008 Decision

Petitioner appealed to the Second Circuit Court of Appeals. By Summary Order, the Second Circuit affirmed. Pet. App. 16a. Its holding incorporated its decision in the case of *Bonime v. Avaya, Inc. ("Bonime")*, 547 F.3d 497 (2d Cir. 2008), in which the Second Circuit determined that arguments similar to those raised by Petitioner failed for two "independent" reasons. *Id.* at 16a-18a; Pet. 6-7; *Bonime*, 547 F.3d at 501-502.

First, the text of the TCPA clearly indicates that courts should treat the TCPA as a state law. Pet. 7; *Bonime*, 547 F.3d at 501. Pursuant to the Congressional instruction set forth in the TCPA's private right of action provision, the Second Circuit held that federal courts must apply state substantive law to putative TCPA class actions brought in federal court. *Bonime*, 547 F.3d at 501. Accordingly, CPLR 901(b)'s express prohibition against TCPA class actions applied to Petitioner's claim and mandated its dismissal. *Id.*; Pet. App. 16a-18a.

Second, the unambiguous language of the TCPA's private right of action provision "constitutes an express limitation on the TCPA which federal courts are required to respect." Pet. 7; *Bonime*, 547 F.3d at 502.

Following the rendition of the Second Circuit's decision, Petitioner sought panel rehearing, or in the alternative, for rehearing en banc, but the Second Circuit denied his request. The Second Circuit's order is reprinted in the Appendix to this Brief in Opposition ("Appx.") at 1b.

V. United States Supreme Court's Remand Order

On April 16, 2009, Petitioner filed a Petition for Writ of Certiorari. This Court granted the petition, vacated the Second Circuit's judgment and remanded the case to the Second Circuit "for further consideration in light of *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co. ("Shady Grove")*, 559 U.S. ____, 130 S.Ct. 1431 (2010)." In Justice Scalia's concurrence, he asserts that *Shady Grove* "assuredly affects – and in all likelihood eliminates – *Bonime's* primary basis for applying [CPLR] §901(b) in federal court. The dissent insists, however, that *Bonime's* second ground remains unaffected." Pet. App. 9a. While Justice Scalia suggests that *Shady Grove* has an impact on *Bonime's* second "independent" ground, the dissent, authored by Justice Ginsburg, and joined by Justice Breyer, contends that "nothing in *Shady Grove* calls for a reading of section 227(b)(3) that fails to fully honor 'the laws [and] rules of a court of [New York] State.' The Second Circuit's interpretation of the TCPA's private-right-of-action authorization stands on its own footing as an adequate and independent ground for dismissing [Petitioner's] suit." Pet. App. at 14a-15a.

VI. Second Circuit's Decision Upon Remand

Upon remand by this Court, the Second Circuit considered the Supreme Court's decision in *Shady Grove* and again affirmed the district court's dismissal of Petitioner's claim. Pet. App. 7a. While the Second Circuit found that *Shady Grove* abrogated the first independent ground set forth in *Bonime*, it also determined that *Shady Grove* did not undermine the

second ground, which revolved around the basic statutory construction of section 227(b)(3). *Id.* Following the rendition of the Second Circuit's post-remand decision, Petitioner sought panel rehearing with a suggestion for rehearing en banc. The Second Circuit denied Petitioner's request. Appx. at 3b.

ARGUMENT

Nothing about the Second Circuit's decision warrants the exercise of this Court's certiorari jurisdiction. The Second Circuit's decision neither conflicts with that of another United States court of appeals on the same important matter nor with that of a state court of last resort on an important federal question—in fact, the Second Circuit's decision involves no important federal question at all.

It involves, instead, a routine application of long-settled principles of statutory construction—principles which both this Court and lower courts nationwide have long articulated and applied as a matter of law. "As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us. 'If the intent of Congress is clear, that is the end of the matter; for the court ... must give effect to the unambiguously expressed intent of Congress.'" *Norfolk & Western Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

Petitioner goes to great lengths in an effort to elevate the Second Circuit's decision to one of profound jurisprudential significance, but the density and circuitry of his argument fail to conceal the fact that

the Second Circuit's decision is the simple consequence of its interpreting and applying a valid and unambiguous statute.

I. Following Remand, the Second Circuit Properly Found that the District Court Correctly Construed and Applied an Unambiguous Statute

When this Court, in *Holster v. Gatco*, 559 U.S. ___, 130 S.Ct. 1575 (2010), issued its order remanding this case to the Second Circuit, it instructed the Second Circuit to consider its prior decision "in light of" *Shady Grove*. Notably, it did not reverse the Second Circuit's original decision in the aftermath of *Shady Grove*.

The Second Circuit complied with that mandate, reconsidered its original decision in light of *Shady Grove*, and affirmed the district court's dismissal of Petitioner's action for lack of subject matter jurisdiction. *Holster v. Gatco, Inc.*, 618 F.3d 214 (2d Cir. 2010); Pet. App. 1a.

In so doing, the Second Circuit acknowledged that the *Shady Grove* decision "abrogated" the first of its two "independent" reasons for originally affirming the district court's decision, *id.* at 217, and its post-remand opinion therefore did not invoke that portion of its original opinion which had been vitiated by *Shady Grove*.

But the Second Circuit also had a second "independent" reason for its original affirmance, and that reason was neither impacted nor even addressed by *Shady Grove*. As noted by the Second Circuit is its post-remand opinion:

> But this answers only a part of the question before us. Though the *Shady Grove* Court said a great deal about the interaction of Rule 23 and C.P.L.R. 901(b), it said nothing at all about the TCPA, and what that statute requires for a federal cause of action to lie. This is not a question that implicates the relationship between the Federal Rules and state rules; it is a standard question of statutory interpretation. What did Congress mean when it said that TCPA suits may proceed "if otherwise permitted by the laws or rules of court of a State," 47 U.S.C. § 227? We now read it, as the concurrence did before, as a delegation by Congress to the states of considerable power to determine which causes of action lie under the TCPA.

Holster, 618 F.3d at 217; Pet. App. 5a. Also,

> [t]hough we find the first ground, predicated on *Erie*, abrogated by *Shady Grove*, we see nothing in the Court's *holding* that undermines the second ground, which rests not on the relationship between the Federal Rules of Civil Procedure and state rules, but on the unique nature of the federal action the TCPA created.

Id. at 216 (italics in original); Pet. App. 4a.

The Second Circuit therefore correctly recognized that *Shady Grove* negated some of the *rationale* for its original decision, but not its holding. *Shady Grove* did not involve the construction and application of the TCPA—in fact, it did not involve the TCPA at all. For that basic reason, this Court's holding in *Shady Grove*

did not compel a reversal of the district court's judgment following remand to the Second Circuit.

Following remand, the Second Circuit engaged in a straightforward inquiry: Did the district court correctly hold that it lacked subject matter jurisdiction over petitioner's putative class action brought under the private right of action provision of the TCPA. Upon analyzing that issue, the Second Circuit engaged in a fundamental, uncontroversial judicial task: it looked at the words of that statute, found them unambiguous, and applied them as Congress had written them.

The TCPA's private right of action provision—section 227(b)(3)—contains language not found in the New York statute under which the plaintiff in *Shady Grove* first sought judicial relief. The latter statute, N. Y. Ins. Law Ann. §5106(a) (West 2009), titled "Fair claims settlement," provides as follows:

> Payments of first party benefits and additional first party benefits shall be made as the loss is incurred. Such benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss sustained. If proof is not supplied as to the entire claim, the amount which is supported by proof is overdue if not paid within thirty days after such proof is supplied. All overdue payments shall bear interest at the rate of two percent per month. If a valid claim or portion was overdue, the claimant shall also be entitled to recover his attorney's reasonable fee, for services necessarily performed in connection with

> securing payment of the overdue claim, subject to limitations promulgated by the superintendent in regulations.

Section 227(b)(3), on the other hand, provides as follows:

> A person or entity may, *if otherwise permitted by the laws or rules of court of a State*, bring in an appropriate court of that State—
>
> > (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
> >
> > (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
> >
> > (C) both such actions.
>
> If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this subparagraph.

(Italics added.)

Congress, when enacting this statute, expressed in unmistakably lucid language its intention that private-party civil actions under section 227(b)(3) may be

brought only "if otherwise permitted by the laws or rules of court of a State." Congress therefore imposed an express restriction upon those considering bringing an action under that statute: they may do so only if otherwise allowed by the laws or court rules of the state in which they seek to bring that action. If the laws or court rules of that state do not permit such an action, they may not bring it in that forum, and if they do, their action is subject to dismissal for lack of subject matter jurisdiction.

It is telling that Congress did not limit that restrictive clause to read that "[a] person or entity may, if otherwise permitted by *the laws* of a State, bring in an appropriate court of that State." Instead, it extended that restriction to include both "the laws *or rules of court* of a State." (Italics added.) In so doing, Congress plainly prohibited persons from pursuing actions under section 227(b)(3) in states where such actions would be barred for *any* reason—not merely because it runs afoul of substantive state law. "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citations and internal quotation marks omitted).

Congress was constitutionally empowered to enact section 227(b)(3) and Petitioner has not argued otherwise, nor plausibly could it. Because the language of that statute is unambiguous, "[i]t is well established that ... the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

That is precisely what the Second Circuit did following the remand of this case to that court. It gave effect to the clear language of a valid federal statute and found that Petitioner's putative New York-based class action under section 227(b)(3) was not "permitted by the laws or rules of court" of New York, specifically, by CPLR §901(b), which provides that "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action."

Shady Grove does not affect that outcome because *Shady Grove* did not construe section 227(b)(3). Unlike the present case, *Shady Grove* originated from a putative class action brought under a *state* statute. State legislatures lack authority to determine the scope of a federal court's jurisdiction. Congress, however, has such authority; it has "plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction." *I.N.S. v. Chadha*, 462 U.S. 919, 941 (1983) (citations and internal quotation marks omitted); *see also Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) ("Congress has the constitutional authority to define the jurisdiction of the lower federal courts, and, once the lines are drawn, limits upon federal jurisdiction ... must be neither disregarded nor evaded.") (Citations and internal quotation marks omitted.)

It is also an "undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally

permissible bounds." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989). Similarly, "Congress ... has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit—either by directly amending the rule or by enacting a separate statute overriding it in certain instances." *Shady Grove*, 559 U.S. ___, 130 S.Ct. 1431, 1438 (2010).

Upon enacting section 227(b)(3), Congress properly exercised its power to define the scope of a federal court's jurisdiction when presented with an action brought under that statute. Congress directed that court to look to "the laws or rules of court of" the state in which the action was brought to determine if the action is "otherwise permitted" by those laws or rules. If not permitted, Congress forbade that court from adjudicating that action—meaning that the court would have no jurisdiction to entertain it—and if such an action *were* to be brought, the court would be duty bound to dismiss it.

That is what happened here. Petitioner brought a putative class action under section 227(b)(3) in a federal district court located in a state—New York—in which such an action is not permitted by that state's laws or court rules. The district court, applying the plain language of that statute, dismissed Petitioner's action for lack of subject matter jurisdiction and the Second Circuit affirmed. In so holding, the Second Circuit applied "the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE*

Sylvania, Inc., 447 U.S. 102, 108 (1980). Petitioner's attempts to cloak the underlying proceedings in an air of impenetrable complexity are unavailing. The Second Circuit's decision was correct and derived from its basic application of long-settled principles of law.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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